

TRACY HAWKS and DALE HAWKS,)
)
 Plaintiffs/Appellees,)
)
 VS.)
)
 CITY OF WESTMORELAND,)
)
 Defendant/Appellant.)

Sumner County Circuit Court
No. 13518-C

Appeal No.
01A01-9606-CV-00270

FILED

November 27, 1996

Cecil W. Crowson
Appellate Court Clerk

IN THE COURT OF APPEALS OF TENNESSEE
MIDDLE SECTION AT NASHVILLE

APPEAL FROM THE CIRCUIT COURT FOR SUMNER COUNTY
AT GALLATIN, TENNESSEE

HONORABLE THOMAS GOODALL, JUDGE

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AFFIRMED AND REMANDED.

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE
WILLIAM C. KOCH, JR., JUDGE

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OPINION

The defendant, City of Westmoreland, has appealed from a non-jury judgment awarding the plaintiffs \$50,000 damages for enlargement of fire damage to plaintiff’s home as a result of the inability of fire fighters to obtain water from fire hydrants near the home.

Defendant presents the following issues for review:

- I. Whether the trial court erred in finding that the dangerous/defective condition at issue was a patent defect as opposed to a latent defect pursuant to Tenn. Code Ann. § 29-20-204(b).
- II. Whether the trial court erred in finding that Defendant City had constructive notice of a dangerous/defective condition pursuant to Tenn. Code Ann. § 29-20-204(b).
- III. Whether the judgment of the trial court is supported by the evidence or is based on a conjecture and speculation.
 - A. Proximate Cause; and
 - B. Damages.
- IV. Whether the trial court erred in failing to grant Defendant City’s motion for dismissal made at the close of the Plaintiffs’ proof pursuant to Tenn. R. Civ. P. 41.02(2)

The fourth issue need not be discussed because, after the Trial Court overruled defendant’s motion to dismiss at the conclusion of plaintiffs’ evidence, defendant proceeded to offer evidence, so that the issue ultimately decided by the Trial Judge and the issue before this Court is whether, under all of the evidence, plaintiff should recover. See *Sadler v. Draper*, 46 Tenn. App. 1, 326 S.W.2d 148 (1959) and authorities cited therein. In the present, non-jury

appeal, this Court must review all of the findings of fact with a presumption of the correctness of the Trial Court's findings, unless the evidence preponderates otherwise. T.R.A.P. 13(d).

The remaining three issues depend upon the evidence which was in substance as follows:

On October 23, 1993, when plaintiffs were out of town, a fire of unknown origin occurred in their home. At approximately 3:45 a.m. firefighters arrived at the scene and "contained" the fire within 15-30 minutes by use of water from tanks on the fire equipment. When this source of water was exhausted, the firefighters attempted without success to obtain water from the two fire hydrants (fire plugs) nearest the home, and the home was almost totally destroyed before water was obtained to extinguish the fire.

The two fire hydrants produced no water when "turned on" because an underground valve in the feeder pipe for each was closed. Although the firefighters carried tools to open the valve in the hydrants, they had no tools to operate the underground valves. Such tools were kept and used only by maintenance employees of the city water system. Underground valves are normally open and should not have been closed on this occasion.

The hydrants in question were installed by the city in May, 1991. The city had no actual notice that the underground valves were closed.

The amended complaint asserts:

The Defendant, City of Westmoreland, is liable unto the Plaintiffs pursuant to the provisions of the Tennessee Governmental Tort Liability Act, TCA Section 29-20-101, et seq, based upon negligent acts and omissions committed by an employee or employees of the City of Westmoreland within the course and scope of his or her employment. Specifically, an employee or employees of the City of Westmoreland committed the following negligent acts and omissions:

(a) Cut off the water supply to the fire hydrants in Plaintiff's subdivision and failed to turn the water back on.

(b) Failed to inspect said fire hydrants for approximately two years prior to the fire on October 23, 1993;

(c) Allowed the fire hydrants to remain in a dangerous and defective condition, with notice of such condition, for approximately two years prior to the fire on October 23, 1993; and

(d) Failed to warn the Plaintiffs that the fire hydrants near their home was inoperable.

Alternatively, the Defendant, the City of Westmoreland, is liable unto the Plaintiffs because Plaintiffs' damages were caused by a dangerous or defective condition of a public improvement owned and controlled by the City of Westmoreland, with the City having actual or constructive notice of such condition.

The Tennessee Governmental Tort Liability Act provides immunity for governmental activities except as provided in T.C.A. § 29-20-204. T.C.A. § 29-20-204 removes immunity for injuries caused by “dangerous or defective condition of any public building, structure, dam, reservoir or other public improvement owned or controlled by such governmental entity.” Immunity is not removed for “latent defective conditions,” except when “constructive or actual notice” is proven. T.C.A. § 29-20-204(b).

§29-20-205 removes immunity for “negligent acts or omissions of employees” except “failure to make an inspection” or “inadequate or negligent inspection of any property.”

By its first issue, appellant insists that the closed valves were “latent defects” for which it is not liable. It is true that the valves were underground and not visible except by removal of the cover of the chamber in which they were situated. However, there is evidence to support constructive notice to the city. The hydrants and associated piping were installed by direction of and contract with the city which employed engineers and inspectors to see that the system was installed properly and operated efficiently. A part of the inspection of a new fire hydrant system is to see that each hydrant produces water when the valve in the hydrant is opened. There is no evidence that these hydrants were so tested and approved as part of the construction process. The

inspection and testing just mentioned is not the “inspection of property” immunized by T.C.A. §29-20-205, above, which refers to inspection of private premises for safety and not inspection of new emergency facilities acquired or constructed by the city.

There is no evidence that any attempt was made to procure water from these hydrants at any time from their installation until the emergency in the present case. The most probable cause of their failure in this emergency was the failure to test their operation at the time of installation and acceptance by the city.

There is also evidence that reasonable care in the maintenance of a water system includes the opening of the valve in each hydrant at least once per year to keep the hydrant valve operable and flush sediment out of the water line and hydrant. There is no evidence that these hydrants were so maintained. If they had been so maintained the closed underground valves would have been discovered and opened. This is another probable cause of plaintiffs’ loss.

In civil cases based upon circumstantial evidence, it is sufficient for the plaintiff to show the more probable cause of his injury and it is not required to exclude every other reasonable conclusion. *Law v. Louisville & N.R. Co.*, 179 Tenn. 687, 170 S.W.2d 360 (1943). *Bryan v. Aetna Life Insurance Co.*, 174 Tenn. 602, 130 S.W. 2d 85 (1939). *Benson v. H.G. Hill Stores, Inc.*, Tenn. App. 1983, 699 S.W.2d 560.

The above stated probabilities are not mere speculation but reasonable deductions from the facts shown by the evidence.

Appellant insists that proximate cause was not shown by a preponderance of the evidence. It is argued that the firemen erred in going some distance to a known source of water instead of searching the surrounding countryside for a hydrant that was operative. In the emergency, the decision to go to a dependable source was a reasonable choice and not negligent.

Appellant finally argues that the plaintiffs failed to prove with particularity and exactitude the amount of fire damage sustained as a result of the inoperative fire hydrants.

It is true that substantial damage resulted from the initial blaze before it was ‘contained’ by the firefighters. It is also true that there was no detailed inspection and appraisal of such damage was made before the second outbreak of fire. Plaintiffs cannot be penalized for the circumstances which rendered impossible the exact measurement of their damages from the second phase of the fire. Exact computation of damages is not required. *Provident Life & Accident Ins. Co. v. Globe Indemnity Co.*, 156 Tenn. 5, 3 S.W.2d 1057 (1928).

Uncertain and speculative damages are prohibited only when existence of damage is uncertain, not when the amount is uncertain. *Redbud Co-op. Corp. v. Clayton*, Tenn. App. 1985, 700 S.W.2d 551.

Mere uncertainty as to the amount of damages will not prevent a recovery if the evidence is of such certainty as the nature of the case permits and such as to lay a foundation to enable the trier of fact to make a fair and reasonable assessment of the damages. *Wilson v. Farmers Chemical Assoc. Inc.*, 60 Tenn. App. 102, 444 S.W.2d 185 (1969).

The overall loss from the entire fire was shown with certainty. Before the fire, the home was appraised as \$66,000. Its value after the fire was shown to be \$6,000. Value of personal property destroyed was shown to be \$15,000.

The firefighters testified that, when they arrived on the scene, some flames were coming through the roof, but the fire, was confined to a bath and the center of the house and was brought under control within 10 to 15 minutes, and there would have been no additional damage if water had been available.

The Trial Judge found that the home was worth \$60,000 before the fire and \$6,500 after the fire, and that the fire damage to the home was \$53,500. He also found that the damages to the house in the first fire was \$5,000, leaving \$48,500 recoverable damage to the house from the resurgent fire.

The Trial Judge found \$15,000 personal property loss, of which \$5,000 was attributed to the first fire and \$10,000 to the second fire.

The combined damages to house and personalty from both fires was therefore found to be \$53,500 plus \$15,000, or \$68,500 . The combined damages to house and personalty from the second fire was found to be \$48,500 plus \$10,000, or \$58,500. However, judgment was rendered for only \$50,000 the statutory maximum under the Governmental Tort Liability Act..

In summary, of the total damage of \$68,500 to house and contents, plaintiff received judgment for \$50,000, or 73% to compensate for damage sustained in the second fire.

The amount of damages attributable to the water shortage was proven with such certainty as the nature of the circumstances permitted. The evidence furnished a foundation from which an approximation of the recoverable damages might reasonably be made. The findings by the Trial Judge and the resulting judgment were reasonably within the parameters of the proof.

The judgment of the Trial Court is affirmed. Costs of this appeal are assessed against the defendant. The cause is remanded to the Trial Court for any necessary proceedings.

AFFIRMED AND REMANDED

HENRY F. TODD
PRESIDING JUDGE, MIDDLE SECTION

CONCUR:

SAMUEL L. LEWIS, JUDGE

WILLIAM C. KOCH, JR., JUDGE